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4 JIMMY K LEE,  
5 Plaintiff,  
6 v.  
7 CITY OF SAN JOSE, et al.,  
8 Defendants.

9 Case No. [23-cv-00778-PCP](#) (VKD)  
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**ORDER RE DISCOVERY DISPUTE RE  
DEPOSITION OF NON-PARTY JOHN  
WIKTOROWICZ**

Re: Dkt. Nos. 78, 80

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14 Plaintiff Jimmy Lee and defendants City of San Jose and Officer Michael Roberson,  
15 together with non-party John Wiktorowicz, ask the Court to resolve their dispute regarding Mr.  
16 Lee's deposition of Dr. Wiktorowicz. *See* Dkt. Nos. 78, 80. The Court finds this dispute suitable  
17 for resolution without oral argument. *See* Civil L.R. 7-1(b).

18 For the reasons explained below, the Court permits the untimely submission of this  
19 dispute, but denies the relief Mr. Lee requests.

20 **I. BACKGROUND**

21 In December 2019, Mr. Lee was involved in an altercation with Dr. Wiktorowicz in a  
22 Home Depot parking lot in San Jose. Dkt. No. 32 ¶ 14. Officers from the San Jose Police  
23 Department arrived at the scene, and Officer Roberson arrested Mr. Lee for making a death threat  
24 and for assault in violation of California Penal Code §§ 422(a) and 245(a)(1). *Id.* ¶¶ 54, 99. The  
25 Santa Clara County district attorney charged Mr. Lee with making a death threat against Dr.  
26 Wiktorowicz. *Id.* ¶ 99. That charge was dismissed in October 2021. *Id.*

27 In this action, Mr. Lee asserts claims for false arrest (i.e., arrest without probable cause)  
28 against both defendants, and a claim for malicious prosecution against Officer Roberson. *See* Dkt.

1 No. 32 (claims 1, 2, and 5); Dkt. No. 44.

2 The parties agreed that Dr. Wiktorowicz's deposition would be conducted at the federal  
3 courthouse in San Jose on July 8, 2024, beginning at 10:30 a.m. and concluding no later than 4:00  
4 p.m. Dkt. Nos. 62, 64. On that date, Dr. Wiktorowicz appeared for his deposition,<sup>1</sup> apparently  
5 without counsel, and was questioned first by counsel for defendants and then by Mr. Lee, who is  
6 representing himself. Dkt. No. 78 at 5. Dr. Wiktorowicz objected to and refused to answer  
7 several of Mr. Lee's questions, and Mr. Lee now seeks an order compelling him to answer those  
8 questions in a further deposition. *Id.* at 2-4. Defendants and Dr. Wiktorowicz oppose this request.  
9 *Id.* at 4-7; Dkt. No. 80.

10 **II. DISCUSSION**

11 The parties' submission requires the Court to resolve two issues: (1) whether the dispute is  
12 timely presented to the Court; and (2) whether the Court should require Dr. Wiktorowicz to  
13 answer nine questions Mr. Lee posed to him during his July 8, 2024 deposition.

14 **A. Timeliness**

15 Defendants argue that the Court need not consider Mr. Lee's request for a further  
16 deposition of Dr. Wiktorowicz because he did not present the dispute for resolution within 7 days  
17 of the July 19, 2024 deadline to complete fact discovery, as required by Civil Local Rule 37-3.  
18 Dkt. No. 78 at 4-5. Mr. Lee responds in a separate declaration appended to the discovery dispute  
19 letter that he did not have a transcript of Dr. Wiktorowicz in time to complete the discovery  
20 dispute letter by July 26, 2024, and that he believed counsel for defendants agreed with him that  
21 waiting for the transcript was desirable. Dkt. No. 78-2 ¶¶ 3-6.

22 Defendants are correct that the discovery dispute letter was not filed until 4 days after the  
23 deadline set by Civil Local Rule 37-3. *See* Dkt. 27 (setting deadline to complete fact discovery).  
24 If Mr. Lee believed having a deposition transcript was necessary to resolution of this dispute, he  
25 should have filed a motion asking the Court to extend the dispute filing deadline before the  
26 deadline passed. However, in view of Mr. Lee's explanation for the short delay in filing the

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28 <sup>1</sup> It is not clear whether Mr. Lee or defendants issued a subpoena under Rule 45 to compel Dr. Wiktorowicz's deposition, or whether he testified without a subpoena.

1 dispute letter, the absence of any apparent prejudice to defendants, and in consideration of Mr.  
2 Lee's *pro se* status, the Court will consider the dispute on its merits.

3       **B. Questions Posed to Dr. Wiktorowicz**

4       Mr. Lee identifies nine questions from Dr. Wiktorowicz's deposition that he says the  
5 witness did not answer but should be required to answer. These questions are reflected in the  
6 deposition transcript excerpts attached as Exhibits A, C, D, E, F, G, H, J, and K.<sup>2</sup> Dkt. No. 78 at  
7 2-4. For purposes of this motion, the Court labels these questions Q1-Q9, as shown below.

8       With some exceptions, the examination of a deposition witness proceeds as it would at trial  
9 under the Federal Rules of Evidence. Fed. R. Civ. P. 30(c)(1).<sup>3</sup> A witness may not refuse to  
10 answer questions in a deposition except to preserve a claim of privilege. Fed. R. Civ. P. 30(c)(2).  
11 A party or witness may object to a question or another aspect of a deposition, but "the examination  
12 still proceeds [and] the testimony is taken subject to any objection." *Id.* However, a party or  
13 witness may terminate a deposition in order to seek a protective order limiting the scope of the  
14 examination under Rule 30(d)(3). *Id.*; Fed. R. Civ. P. 30(d)(3) (permitting motion to terminate or  
15 limit deposition if it is "being conducted . . . in a manner that unreasonably annoys, embarrasses,  
16 or oppresses the deponent or party."). Further, all discovery, including deposition discovery, is  
17 governed by Rule 26(b)(1), which limits discovery to nonprivileged matters that are relevant to a  
18 party's claim or defense and proportional to the needs of the case. Fed. R. Civ. P 26(b)(1).

19       None of the questions at issue concern matters of privilege. Thus, Dr. Wiktorowicz was  
20 required to answer these questions, subject to any objections, unless he or defendants obtain a  
21 protective order limiting the scope of Mr. Lee's examination.

22       **1. Questions about Mr. Wiktorowicz's own statements**

23       With respect to three of the nine questions at issue, the parties disagree about whether Dr.  
24 Wiktorowicz properly refused to answer questions about statements he made to the police about

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26       <sup>2</sup> The deposition excerpts in Exhibits B and I are cited by Mr. Lee as support for his contentions as  
to the other questions. *See* Dkt. No. 78 at 2, 4.

27       <sup>3</sup> As this case is in federal court, the California Code of Civil Procedure (to which Mr. Lee refers)  
28 does not apply. Depositions in federal cases are governed by the Federal Rules of Civil  
Procedure.

1 the altercation in December 2019, nearly five years before the date of the deposition. According  
2 to the parties, all of the statements to which these questions refer were recorded at the scene. Dkt.  
3 No. 78 at 6. The specific questions are as follows:

4       **Q1** “Here’s my question: You told the police, ‘Okay. That’s great. I have a real  
5 character here. And I thought, you know, I’m gonna – I’m gonna call the police  
6 because the guy is out of control. And that’s when the two guys came, and I was  
7 here.’ I did not mean that you were there with the police. Did you tell the police,  
8 ‘And that’s why – when two guys came, and I was here.’?” Dkt. No. 78-1, Ex. A  
9 (115:5-12).

10       **Q3** “Did you tell the police that, ‘I got confirmation that you were coming out. Brandon  
11 came over. I stood there, and I was talking. He came out. I was – I came out of the  
12 car.’?” *Id.*, Ex. D (125:19-22).

13       **Q4** “So you’re saying this is not true? Okay. This statement, ‘And – and – and then he  
14 start, pissed off, agitated, quote, ‘I’m going to sue you’, end quote. You never told  
15 the police that?” *Id.*, Ex. E (128:21-24).

16       In each of these questions, Mr. Lee asked Dr. Wiktorowicz to confirm whether he made  
17 specific statements to the police. Each statement appears to be a quote from a transcript of a  
18 recording, but Mr. Lee refused to share a copy of the transcript with the witness, while demanding  
19 a definitive, “yes” or “no,” answer about whether Dr. Wiktorowicz made the specific statement  
20 quoted in each question. Mr. Lee argues that he was entitled to question Dr. Wiktorowicz in this  
21 manner because the Federal Rules of Evidence do not permit the use of a “recorded recollection”  
22 unless an appropriate exception to the rule against hearsay is established. *See id.* at 2 (citing Fed.  
23 R. Evid. 803(5)). Defendants respond that these questions are “objectionable” and “improperly  
24 phrased,” presumably because Mr. Lee failed to provide a copy of the transcript to the witness, but  
25 they do not further elaborate on the bases for their objections. *See id.* at 6-7. Dr. Wiktorowicz  
26 responds to Mr. Lee’s argument as follows:

27       I objected to inquiries that required me to confirm statements  
28 alleged by the plaintiff to have been made by me at various times

during the incident because the plaintiff had failed to provide me with a copy of the official, certified transcript of the attending officer's records. Since I was under oath, and the plaintiff was not, I could not confirm the veracity of the plaintiff's reading of my alleged response.

Dkt. No. 80.

Mr. Lee’s reliance on Rule 803(5) of the Federal Rules of Evidence is misplaced, as his questioning of Dr. Wiktorowicz does not implicate the admissibility of the recording (or transcript) in question. Nevertheless, it is entirely proper for a party, such as Mr. Lee, to ask a witness to testify in a deposition about the witness’s unrefreshed recollection of an event. However, this is not a fair description of Mr. Lee’s questioning. Each of the three questions identified above was preceded by *another* question or questions in which Mr. Lee asked Dr. Wiktorowicz about what he said to the police in a more open-ended fashion, and the witness responded, variously, by providing his present recollection or stating that he either does not know, does not recall, or cannot answer without some additional context. *See* Dkt. No. 78, Ex. A (114:4-16), Ex. D (125:4-13), Ex. E (128:2-20). Only then did Mr. Lee press Dr. Wiktorowicz to agree or disagree with Mr. Lee’s apparently verbatim recitation of material quoted from a transcript, which the witness refused to do without an opportunity to review the transcript or the recording himself.

The Court has carefully reviewed the deposition excerpts attached to the discovery dispute letter and finds that further deposition on these three questions is not warranted. Having obtained Dr. Wiktorowicz's testimony describing his unrefreshed recollection about the contents of his own statements, it was unreasonable and improper for Mr. Lee to then insist that the witness confirm or deny that a transcript says what it says (or accurately reflects what is in a recording) without affording the witness access to either the transcript or the recording. More importantly, if a recording and/or an accurate transcript exists of the statements Dr. Wiktorowicz made at the time, it is unnecessary and disproportionate to the needs of this case for Mr. Lee to seek additional deposition testimony for the sole purpose of requiring Dr. Wiktorowicz to agree that the recording or transcript indeed contains those statements.

For these reasons, the Court denies Mr. Lee's demand for a further deposition of Dr. Wiktorowicz regarding Q1, Q3, and Q4.

1                   **2.       Questions about other witnesses' statements**

2                  With respect to three other questions at issue, the parties disagree about whether Dr.  
3 Wiktorowicz properly refused to answer questions about statements made by two other witnesses  
4 the December 2019 altercation, as well as his location during one of those statements, as reflected  
5 in a recording or recordings made of the incident. Dkt. No. 78 at 3-4, 7. The specific questions  
6 are as follows:

7                  **Q6** “So can you explain why the body cam would show your face – [interruption] –  
8                   when you were not there?” *Id.*, Ex. G (161:11-12).

9                  **Q7** “She [Ms. Coakley] told the police, ‘So then I came. He went back to his car and get  
10                 this pipe, a PVC pipe. Then I came around and rolled down my window and said, “If  
11                 you don’t stop, I’m calling the police.”’ Now if that’s true, wouldn’t that be a false  
12                 statement to the police? Because your testimony was that I went to hit your car  
13                 window with a pipe, but she’s giving a totally different statement. . . . I just read her  
14                 statement, and I asked you, ‘Is it a false testimony?’” *Id.*, Ex. H (163:25-164:7,  
15                 165:12-13).

16                  **Q8** “Thompson said, ‘No, not that I did not hear or see,’ when he was being questioned  
17                 about me making a threat to you. Do you agree with that?” *Id.*, Ex. J (168:10-13).

18                  In each of these questions, Mr. Lee asks Dr. Wiktorowicz to confirm whether another  
19                 person (i.e., witnesses Coakley and Thompson) made a specific statement to the police and  
20                 whether Dr. Wiktorowicz appears on the recording at the time of one of the statements. As with  
21                 questions concerning Dr. Wiktorowicz’s own statements, in Q7 and Q8 Mr. Lee appears to quote  
22                 from a transcript of a recording, but he refused to share a copy of the transcript with the witness.  
23                  In Q6, Mr. Lee appears to refer to an image from a body worn camera video depicting the witness,  
24                 but he refused to share the video with Dr. Wiktorowicz during the deposition. Mr. Lee argues  
25                 again that he was entitled to question Dr. Wiktorowicz in this manner because the Federal Rules of  
26                 Evidence do not permit the use of a “recorded recollection.” *See id.* at 3-4. Defendants respond  
27                 similarly that these questions are “objectionable” and “improperly phrased” on the same grounds  
28                 as for Q1, Q3, and Q4, *see id.* at 7, and Dr. Wiktorowicz also makes the same objections as before,

1       see Dkt. No. 80.

2                  The Court has carefully reviewed the deposition excerpts attached to the discovery dispute  
3 letter. With respect to Q6, the relevant excerpt reflects that Mr. Lee had ample opportunity to ask  
4 Dr. Wiktorowicz about where he was when a particular statement was made, but Mr. Lee persisted  
5 beyond such questioning in asking Q6, which literally asks the witness to explain why a recording  
6 shows something about Dr. Wiktorowicz's location without showing the recording to him. The  
7 Court concludes that it is unnecessary and disproportionate to the needs of this case for Mr. Lee to  
8 seek additional deposition testimony for the sole purpose of requiring Dr. Wiktorowicz to agree or  
9 disagree that the recording shows what it shows. Similarly with respect to Q7 and Q8, the relevant  
10 excerpts reflect that Mr. Lee had an opportunity to question, and did question, Dr. Wiktorowicz  
11 about his recollection of the incident, but then Mr. Lee insisted that Dr. Wiktorowicz also state  
12 whether he agrees that two other witnesses' recorded statements to the police were "false  
13 testimony." Dkt No. 78, Ex. H (163:3-165:13), Ex. J (167:1-12). Regarding Q7, Dr. Wiktorowicz  
14 answered that the statement Dr. Lee quoted is not consistent with his own recollection, but that  
15 "she [witness Coakley] can say whatever she wants." *Id.*, Ex. H (165:4-8). Regarding Q8, Dr.  
16 Wiktorowicz answered that he simply does not know what witness Thompson heard or saw or  
17 said, and therefore cannot agree or disagree with the quoted statement or whether witness  
18 Thompson was being truthful. *Id.*, Ex. J (167:17-168:24). Having obtained such testimony, it was  
19 unreasonable and improper for Mr. Lee to then insist that Dr. Wiktorowicz agree or disagree with  
20 Mr. Lee's characterization of other witnesses' statements as "false testimony," and it would be  
21 disproportionate to the needs of this case for Mr. Lee to seek additional deposition testimony for  
22 the sole purpose of requiring Dr. Wiktorowicz to answer such questions.

23                  For these reasons, the Court denies Mr. Lee's demand for a further deposition of Dr.  
24 Wiktorowicz regarding Q6, Q7, and Q8.

25                  **3. Other questions**

26                  Additionally, Mr. Lee asks the Court to order Dr. Wiktorowicz to answer three other  
27 questions, reproduced below.

28                  **Q2** "What I'm asking you is – so it took 12 seconds between I hit the car with [sic] hands

1 and the time that I returned to try to hit your car with the pipe? Was it 12 seconds  
2 long? Dkt. No. 78, Ex. C (120:15-18).

3 Mr. Lee argues that Dr. Wiktorowicz “seem[s] to have suggested that the entire alleged  
4 assault occurred during the beginning 16 seconds of [the audio recording of the police dispatch  
5 call],” and that he is entitled to obtain the witness’s “estimates on timing.” *Id.* at 2. Defendants  
6 and Dr. Wiktorowicz respond that Dr. Wiktorowicz answered Mr. Lee’s questions to the best of  
7 his ability based on his memory of the incident. *Id.* at 7; Dkt. No. 80. Having reviewed the  
8 transcript excerpt attached to the discovery dispute letter, the Court agrees that Dr. Wiktorowicz  
9 fairly answered Mr. Lee’s questions about what he recalls occurred and the sequence of events.  
10 Dkt. No. 78, Ex. C (120:5-14). When asked how long those events took, he answered that he does  
11 not know, and explained why he could provide a more precise answer. *Id.*, Ex. C (120:15-24,  
12 123:21-124:19). Having obtained this testimony, Mr. Lee’s follow up questions, such as requiring  
13 the witness to agree or disagree about the precise duration of the events, were duplicative and  
14 unreasonable.

15 **Q5** “So at what point in time during the cell video Brandon told you that he heard the  
16 threat?” *Id.*, Ex. F (149:3-4).

17 Referring to a video recording Dr. Wiktorowicz made on his own cell phone, Mr. Lee  
18 argues that Dr. Wiktorowicz should be required to watch the video and answer Q5. *Id.* at 3.  
19 Defendants and Dr. Wiktorowicz respond that Dr. Wiktorowicz answered Mr. Lee’s question to  
20 the best of his ability based on his memory of the incident. *Id.* at 7; Dkt. No. 80. The Court has  
21 reviewed the transcript excerpt attached to the discovery dispute letter. That excerpt reflects that  
22 Dr. Wiktorowicz responded to Q5 by stating: “I can’t recollect.” Having obtained that testimony,  
23 Mr. Lee appears to seek additional deposition testimony for the sole purpose of asking Dr.  
24 Wiktorowicz to testify that the video recording reflects a statement from “Brandon” at a particular  
25 point or timestamp in the video. The Court is not persuaded that such testimony has any  
26 evidentiary value.

27 **Q9** “So about the cell video. Okay. You sent your email to [the district attorney]. . . .  
28 When?” Dkt. No. 78, Ex. K (171:3-8).

1 Referring again to the video recording Dr. Wiktorowicz made on his own cell phone, Mr.  
2 Lee argues that Dr. Wiktorowicz did not answer Q9 in “good faith.” *Id.* at 4. Defendants and Dr.  
3 Wiktorowicz respond that Dr. Wiktorowicz answered Mr. Lee’s question to the best of his ability  
4 based on his memory of the incident. *Id.* at 7; Dkt. No. 80. The Court has reviewed the transcript  
5 excerpt attached to the discovery dispute letter. That excerpt reflects that Dr. Wiktorowicz  
6 responded to Q9 by stating: “I don’t know what day it was. It was, obviously, before the  
7 scheduled trial.” Dkt. No. 78, Ex. K (171:14-15). Mr. Lee believes that Dr. Wiktorowicz should  
8 be able to provide a better estimate, but that is not a sufficient justification for a further deposition  
9 of this witness. Moreover, the Court is not persuaded that further testimony about the date of  
10 transmission of the video recording to the district attorney has any evidentiary value.

11 **III. CONCLUSION**

12 For the reasons explained above, the Court denies Mr. Lee’s demand for a further  
13 deposition of Dr. Wiktorowicz regarding the questions identified above as Q1-Q9, and concludes  
14 that Dr. Wiktorowicz is entitled to a protective order against further deposition on these questions.

15 **IT IS SO ORDERED.**

16 Dated: August 9, 2024

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18 Virginia K. DeMarchi  
19 United States Magistrate Judge  
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